

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Washington, DC 20001-8002

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Issue date: 10Apr2002

Case No: 2001-INA-00143

In the Matter of:

CAROL MARTZ
Employer

On Behalf of:

JUDITH ALONZO
Alien

Appearance: Lisa Zakar, Esq.
for the Employer and the Alien

Certifying Officer: Martin Rios
San Francisco, California

Before: Holmes, Vittone and Wood
Administrative Law Judges

JOHN C. HOLMES
Administrative Law Judge

DECISION AND ORDER

This case arose from an application for labor certification on behalf of alien, Judith Alonzo ("Alien") filed by Employer, Carol Martz ("Employer") pursuant to 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. 1182(a)(5)(A)(the "Act"), and the regulations promulgated thereunder, 20 CFR Part 656. The Certifying Officer ("CO") of the U.S. Department of Labor, San Francisco, California denied the application, and the Employer and Alien requested review pursuant to 20 CFR 656.26.

Under 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor ("Secretary") has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified and

available at the time of the application and at the place where the alien is to perform such labor; and, (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed.

Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other means in order to make a good faith test of U.S. worker availability.

The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File ("AF"), and any written arguments of the parties.

STATEMENT OF THE CASE

On July 31, 1998, the Employer filed an amended application for labor certification to enable the Alien to fill the position of Cook, Domestic Service in its private home.

The duties of the job offered were described as follows:

"The cook will prepare all meals for the family home and for business dinners and entertaining in the family home. Will plan menus and cook meals in accordance with the recipes and requests of the employers. Will serve meals and foods tastefully. Will prepare meats, vegetables, salads, soups, and sauces from scratch. Will clean kitchen and cooking utensils."

Two years experience in the job was required. Wages were \$538.80 per week. The applicant supervises 0 employees and reports to the Owner of Home. (AF-10-98)

On April 27, 2001, the CO issued a NOF denying certification. The CO citing Section 656.20(c)(8) found that the job opportunity may not have been open to U.S. workers. Specifically, the CO stated that the application did not contain enough information to determine whether the position of Domestic Cook actually exists in Employer's household or whether it was created solely for the purpose of qualifying the alien as a skilled worker under current immigration law.

To qualify as a bona fide opportunity, rebuttal evidence at a minimum must include documentation of the following: (1) number and length of time to prepare meals; (2) work and/or school schedules of household members; (3) entertainment schedule for previous 12 months in detail; (4) how children will be cared for during parental absences; (5) any special dietary circumstances; (6) percent of disposable income to payment of salary and proof of income; (7) details of any other household workers; (8) if the position is new, what circumstances necessitates it. Secondly, nine applicant resumes were forwarded to Employer. The evidence that had been provided was not convincing that efforts to contact applicants was made within 14 day "reasonable" period. (AF-6-9)

On May 21, 2001, Employer forwarded its rebuttal through counsel contending that the job was a bona fide job opportunity. The two page letter stated the need for two meals per day, minimum; adult work schedules from early morning until evening; business entertainment three times per month approximately; that there were three children aged 15, 14 and 6, the older two of whom would take care of the younger when parents were not home; the income clearly covered the salary requirements of a cook. The position was new, but the requirements of two high level entertainment industry positions dictated the need for a cook. Employer stated further: "The employer made a bona fide effort to contact all applicants in a timely fashion. All attempts to contact applicants was made well within the fourteen day receipt of the resumes. Contact was made by telephone with all but three of the nine applicants. All six contacted indicated that they were either not interested in the position or did not satisfy the minimum requirements. Repeated messages were left on the answering machines of Mr. Rivera and Mr. Tyson during different times of day and on many days with no reply. Mr. Alunowski was the only one that could not be reached and a letter was sent to him within 14 days of receipt for his resume, but he never responded. (Attached is a copy of the letter to Mr. Alunowski and a detailed report of the results of interviews with the nine applicants.)" (AF-4-5)

On June 15, 2001 the CO issued a Final Determination denying certification, stating that the employer did not provide the requested documentation to support attempts to contact the U.S. applicants. The NOF contained examples of types of documentation required including dates of telephone

contact; telephone bills highlighting the applicants' telephone numbers; and the name and number of the persons who did the telephoning or mailing. The CO stated: "The employer did not provide additional information to support the previously submitted recruitment results... The rebuttal did not add any additional information regarding the telephone contact of the applicants. All of the applicants who were contacted by telephone or had messages left on their answering machines had area codes that were outside of the employer's area code. Each of these calls would be recorded on the employer's telephone bill. The employer did not include any supporting documentation to demonstrate that the letter to Konrad H. Alunowski was mailed within the 14 days after receipt of the resume or as soon as possible..."(AF-2-3)

On July 24, 2001, the Employer's request for review of denial of labor certification was received by the CO and later forwarded to this office. (AF-1)

DISCUSSION

The employer has the burden of persuasion on the issue of lawful rejection of U.S. workers. Cathay Carpet Mill, Inc., 1987-INA- 161 (Dec. 7, 1988)(en banc) Although written assertions constitute documentation that must be considered under Gencorp, 1987-INA-659 (January 13, 1988)(en banc), bare assertions without supporting evidence are generally insufficient to carry an employer's burden of proof. Sang Chung Insurance Agency, 2000-INA-259 (January 11, 2001) The good faith requirement in recruiting efforts is not set forth in the regulations, but is implicit. H.C. LaMarche Enterprises, Inc., 1987-INA-607 (Oct. 27, 1988)

Clearly, Employer here did not provide the documentation required by the CO to demonstrate that a good faith effort was made to recruit U.S. applicants. Given the large number of apparently available U.S. workers, Employer had an obligation to demonstrate that he had properly and timely followed up with those applicants. This Employer failed to adequately do. The CO acted reasonably in denying certification.

ORDER

The Certifying Officer's denial of labor certification is
AFFIRMED.

For the Panel:

A
JOHN C. HOLMES
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

**Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W.
Suite 400
Washington, D.C. 20001-8002**

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.